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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiffs,

vs.

David Allen Harbour,

Defendant.

CR-19-00898-PHX-DLR (DMF)

**UNITED STATES' RESPONSE TO
DEFENDANT'S MOTION TO STAY
FORFEITURE PENDING APPEAL (Doc.
925)**

INTRODUCTION

On July 23, 2024, Defendant David Allen Harbour filed a Motion to Stay Forfeiture Pending Appeal, Doc. 925 (the "Motion"). The Motion asks that the Court "stay the government from moving forward to sell the property seized for forfeiture." Doc. 925 at 2. Defendant cites no case law, and makes only a passing reference to Federal Rule of Criminal Procedure 32.2(d), in support of his request. The Court should deny the Motion because Defendant has failed to make a sufficient showing to merit exercise of the Court's discretionary authority.

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2 **LEGAL STANDARD AND ANALYSIS**

3 To clarify the posture of the forfeiture proceeding in this case, the Court has
4 entered an Order of Forfeiture, Doc. 801, an Amended Order of Forfeiture
5 identifying substitute assets for forfeiture in partial satisfaction of the money
6 judgment imposed against Defendant, Doc. 853, and partially granted Defendant's
7 Motion for Reconsideration of the Forfeiture Order, Doc. 857, to adjust the
8 calculation of Defendant's forfeiture money judgment. The Order of Forfeiture, as
9 amended, became final as to Defendant at sentencing. Doc. 801 at 8, Doc. 853 at 3.
10 Defendant filed a Notice of Appeal to the Ninth Circuit, appealing his conviction
11 and sentence, including the Order of Forfeiture. Doc. 863. At Defendant's request,
12 the Ninth Circuit has since stayed the appeal pending resolution of proceedings in
13 the district court. *United States v. Harbour*, No. 24-696 (9th Cir.), Doc. 11.

14 The government's Declaration of Publication, Doc. 924, filed on July 17,
15 2024, is a notification for the record that the government has completed its third
16 party noticing obligations as set forth in Rule 32.2(b)(6) and as contemplated in the
17 Court's Amended Order of Forfeiture, Doc. 853. The act of providing notice of a
18 pending forfeiture to known potential third party petitioners offers due process to
19 those who may wish to assert an interest in the forfeited property. The filing of a
20 statement verifying that such notice has taken place establishes a clear record and
21 confirms that the required notice has in fact taken place. This notice is provided to,
22 and is for the benefit of, non-parties to the criminal case. Once alerted to the
23 pending forfeiture, potential interest-holders may choose to file a petition and
24 thereby initiate an ancillary proceeding. A defendant from whom property was
25 forfeited lacks standing to appear in an ancillary proceeding and can only assert the
26 interest of another to the extent that the defendant is a legal representative of that
27 interest-holder. *United States v. Mertens*, 455 F. App'x 767 (9th Cir. 2011); *United*
28 *States v. Bennett*, 147 F.3d 912, 914 (9th Cir. 1998). Defendant's speculations

1 regarding Abby Harbour's interests in the property to be forfeited, Mot. at 3-4, are
2 therefore irrelevant to this Motion.

3 Defendant has not established that a stay is necessary to preserve the
4 forfeited property. Federal Rule of Criminal Procedure ("Rule") 32.2(d) provides
5 that, if an appeal is filed as to a conviction or order of forfeiture, the district court
6 *may* stay an order of forfeiture "on terms appropriate to ensure that the property
7 remains available pending appellate review." The decision whether to issue a stay
8 under Rule 32.2(d) is confided to the district court's discretion. Courts often
9 consider four factors in determining whether to stay an order of forfeiture: (1) the
10 likelihood of success on appeal; (2) whether the forfeited asset will likely depreciate
11 over time; (3) the forfeited asset's intrinsic value to the defendant; and (4) the
12 expense of maintaining the forfeited asset. *United States v. Riedl*, 214 F. Supp. 2d
13 1079, 1082 (D. Haw. 2001) (collecting cases).

14 Defendant has not demonstrated a considerable likelihood of success on
15 appeal, as the Motion merely rehashes arguments already considered and rejected
16 by the Court at length. *See* Docs. 769 (denying Defendant's Motion for
17 Reconsideration), 800 (denying Defendant's Motion for Reconsideration of
18 Renewed Rule 29 Motion), 857 (granting Defendant's Motion for Reconsideration
19 of Forfeiture Order only as to partial loss causation). Defendant has also not made
20 any showing that any property ordered forfeited as either direct proceeds of his
21 fraudulent scheme or as substitute property has special intrinsic value. While much
22 of the property identified in the forfeiture orders is either in the form of currency or
23 jewelry, and as such are not likely to depreciate or create a substantial maintenance
24 expense, the capital trust account with BackJoy Orthotics, LLC identified as a
25 substitute asset is of uncertain value. Staying forfeiture would hamper efforts to
26 liquidate and preserve the value of this asset. Given Defendant's failure to articulate
27 a reason that forfeiture must be stayed, the Court should decline to exercise its
28 discretion.

1 Even if the Court were to impose a stay as to the finality of the forfeiture
2 order, it could still adjudicate third party interests in the ancillary proceeding or
3 order the forfeiture of Defendant's other assets in satisfaction of the money
4 judgment. "A stay [pending appeal] does not delay the ancillary proceeding or the
5 determination of a third party's rights or interest." Fed. R. Crim. P. 32.2(d).
6 Criminal Rule 32.2(e) provides that "the court may at any time . . . amend an
7 existing order of forfeiture to include property that . . . is substitute property that
8 qualifies for forfeiture under an applicable statute." The advisory committee notes
9 to Rule 32.2 explain that "[s]ubdivision (e) makes clear, as courts have found, that
10 the court retains jurisdiction to amend the order of forfeiture at any time to include .
11 . . substitute property." Fed. R. Crim. P. 32.2, advisory committee's note to
12 subdivision (e) (2000); *see United States v. Carpenter*, 941 F.3d 1, (1st Cir. 2019).
13 The Court should therefore in any case leave the forfeiture action open to resolve
14 third party interests or to amend the order, should the government locate further
15 substitute assets.

16 CONCLUSION

17 For the foregoing reasons, the government respectfully requests that the
18 Court deny Defendant's Motion to Stay Forfeiture Pending Appeal.

19 Respectfully submitted this 6th day of August, 2024.

20 GARY M. RESTAINO
21 United States Attorney
22 District of Arizona

23 s/Joseph F. Bozdech
24 Joseph F. Bozdech
25 Assistant United States Attorney
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CERTIFICATE OF SERVICE

I hereby certify that on this same date, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing a copy to the following CM/ECF registrant:

Stephen M Dichter, *Attorney for Defendant*

s/ Ray Southwick
U.S. Attorney's Office